



DEPARTMENT OF THE ARMY
PORTLAND DISTRICT, CORPS OF ENGINEERS
P. O. BOX 2946
PORTLAND, OREGON 97208-2946

Reply to
Attention of:

October 19, 1993

Planning and Engineering Division

SUBJECT: Regulatory Changes

The enclosed Public Notice, dated September 17, 1993, is being furnished to inform you of recent changes in our regulations pursuant to Section 404 of the Clean Water Act. These regulations may affect your ongoing or planned activities in water of the United States. Your name was selected because you or your company were recently issued a Fill/Removal Permit for work in waters of the State from Oregon Division of State Lands.

On August 25, 1993, our regulations were changed to reflect that activities such as, mechanized land clearing, ditching, stream channelization, dredging, and excavation, in waters of the United States are subject to jurisdiction under Section 404 of the Clean Water Act and will require Department of the Army authorization. Prior to this regulation change we did not require Section 404 permits for most of these activities. Other major changes are: (1) in certain circumstances the placement of piling in a waters of the United States may require authorization under Section 404; and (2) prior converted cropland is not a waters of the United States; therefore, any activity taking place within this area is not subject to our jurisdiction.

Please carefully read the Public Notice to determine if any of your activities will require a Section 404 permit. If you have questions regarding our regulatory authority or our permit evaluation process, please contact this office for additional information.

U.S. Army Corps of Engineers, Portland District
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P.O. Box 2946
Portland, Oregon 97208-2946
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US Army Corps
of Engineers
Portland District

Public Notice

New Regulations

September 17, 1993

The U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) have amended their permit regulations defining discharges of dredged material and fill material and clarifying that prior converted cropland is not waters of the United States. The final rule was published on Friday, August 25, 1993, in the Federal Register at 58 FR 45008. The effective date of the final rule is September 24, 1993. The proposed changes were published in the Federal Register on June 16, 1992, for public comment. The comment period closed on August 17, 1992. We received over 6,300 comments most of which supported changing the definitions of discharges of dredged material and fill material.

The final regulations implement the following actions with regard to the Clean Water Act (CWA) Section 404 regulatory program: (1) modification of the definition of "discharge of dredged material" to include incidental discharges associated with excavation activities; (2) clarification of when the placement of pilings is considered to be a discharge of fill material; and (3) modification of the Corps and EPA's policy that prior converted croplands are not waters of the United States. EPA also issued conforming changes to its CWA program regulations. Overall, these changes will promote national consistency, they will more clearly notify the public of regulatory requirements, ensure that the Section 404 regulatory program is more equitable to the regulated public, enhance the protection of waters of the United States, and clarify which areas in agricultural crop production would not be regulated as waters of the United States. This final rule is part of President Clinton's August 24, 1993, Wetlands Protection Plan which provides a fair, effective and flexible approach to wetlands protection.

Pursuant to Section 404 of the Clean Water Act a permit is required from the Corps of Engineers for the discharge of dredged or fill material into all waters of the United States. The term discharge of dredged material means any addition of dredged or excavated material into, including any redeposit of dredged material within waters of the United States. The definition of discharge of dredged material was modified to recognize that excavation activities generally result in at least some incidental discharge of dredged material. The term discharge of fill material means the addition of any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The definition of fill material was modified to recognize that the placement of pilings can have the effect of fill material. Furthermore, pursuant to Section 10 of the Rivers and Harbors Act of 1899 a permit is required from the Corps of Engineers for activities, including excavation and fill, in navigable waters of the United States.

EXCAVATION ACTIVITIES

Excavation Activities that Require a Section 404 Permit.

1. Mechanized landclearing, ditching, channelization, and other excavation activities that destroy or degrade waters of the United States, including wetlands, require a Section 404 permit under the Clean Water Act.

2. Dredged or excavated material placed at a specific discharge site in waters of the United States;

3. Runoff or overflow associated with dredging operations from a contained land or water disposal area.

Excavation Activities that do not Require a Section 404 Permit:

1. Any incidental addition, including redeposit, of dredge material associated with any activity where the activity does not have or would not have the effect of destroying or degrading an area of waters of the United States provided that any person or persons, prior to commencing an excavation activity involving a discharge, demonstrates to the satisfaction of the Corps, that the activity would not have the effect of destroying or degrading waters of the United States.

2. Incidental movement of dredged material occurring during dredging for navigation in navigable waters of the United States, which are traditional navigable waters; provided the dredging is either authorized by Congress and/or the Corps pursuant to Section 10 of the Rivers and Harbors Act of 1899. However this exception is not applicable to dredging activities in navigable waters of the United States that are wetlands.

3. Activities that qualify for the Grandfather Provision (see below).

4. Certain discharges, such as those associated with normal farming, silviculture, and ranching activities as defined under Section 404 (f) of the CWA.

5. Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

Impacts to wetlands and waters associated with the above mentioned incidental discharges will be assessed on a case-by-case basis. It is the responsibility of any persons preparing to undertake an excavation activity to demonstrate to the satisfaction of the Corps, that the activity would not have the effect of destroying or degrading waters of the United States.

GRANDFATHER PROVISION. Section 404 authorization will not be required for discharges of dredged material associated with ditching, channelization, or other excavation activities in waters of the United States, including wetlands, where such discharges were not previously regulated and where such activities had commenced or were under contract to commence prior to August 25, 1993, and where such activities are completed before August 25, 1994. The Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision subject to the following three conditions:

1. The excavation activity is of the type that occurs on an ongoing basis, either periodic or continuously (e.g., mining operations);

2. The discharger has submitted to the Corps within the 12-month period between August 25, 1993, and August 25, 1994, an individual permit application seeking a Section 404 authorization for such excavation activity; and

3. In no event can the grandfather provision be extended beyond August 25, 1996.

There are no grandfather provisions for mechanized landclearing and the placement of pilings, since these activities were regulated prior to this rule. Furthermore, the grandfather provision does not apply to other excavation activities that were regulated prior to this rule.

PLACEMENT OF PILINGS

Placement of Pilings that Require a Section 404 Permit.

The placement of pilings in waters of the United States in such a manner that the pilings and supported structure have the effect of a discharge of fill material.

Examples of such activities include, but are not limited to, the following:

1. Projects where the pilings are so closely spaced that sediment accumulates at higher rates;
2. Projects where the pilings themselves effectively replace the bottom elevation of a waterbody or wetland;
3. Projects involving the placement of pilings that would reduce or impair the flow or circulation of waters of the United States; and
4. Projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

Placement of Pilings that Generally does not Require a Section 404 Permit.

1. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures.
2. Placement of pilings in waters of the United States for piers, wharves, and individual houses on stilts.

NOTE: All pilings that are placed in navigable waters of the United States, as defined in 33 CFR Part 329, require authorization under Section 10 of the Rivers and Harbors Act of 1899 (see also 33 CFR Part 322).

PRIOR CONVERTED CROPLAND

The regulation clarifies the Corps and the EPA's position that prior converted croplands, as defined by the Soil Conservation Service, are not waters of the United States. Generally, prior converted croplands were once wetlands but have been drained, dredged, filled, or otherwise manipulated before December 23, 1985, for the purpose of and having the effect of making the production of an agriculture commodity possible. No Section 404 permit is required for any activities conducted on such lands, unless such lands are considered to be abandoned and subsequently develop the characteristics of a wetland.

FOR FURTHER INFORMATION

Additional information concerning the final rule can be obtained from:

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